A

Chan Huasheng v Kerk Ke Yee & Ors

B

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO JA-24F-44–02 OF 2019
CHOO KAH SING J
22 NOVEMBER 2019

C

Civil Procedure — Affidavit — Admissibility — Defendants filed affidavits one day before hearing — Whether affidavits admissible

D

Civil Procedure — Judgments and orders — Order made by court — Defendants filed appeal to Court of Appeal against ruling made by court — Whether ruling of court had been excluded from definition of 'decision' within s 3 of Courts of Judicature Act 1964 — Whether ruling appealable — Courts of Judicature Act 1964 ss 3 & 67

E

The originating summons ('OS') filed by the plaintiff on 25 February 2019 was, inter alia, for an order that the rights of custody, care and control of the plaintiff's daughter, 1 1/2 years of age, be granted to the plaintiff. On 1 July 2019, the hearing day itself, the first defendant filed an affidavit in reply in response to the plaintiff's second affidavit which was filed on 10 June 2019. In view of the last minute filing of the first defendant's affidavit in reply, the court could not proceed with the hearing of the OS because the plaintiff sought permission to reply to the first defendant's affidavit in reply. Notwithstanding the adjournment of the hearing of the OS caused by the last minute filing of the first defendant's affidavit in reply, the parties reached a consensus to enter an interim consent order in the terms as agreed. One of the terms agreed in the interim consent order was that the entire terms in the said interim order will be subjected to a review by the court on 5 September 2019. On 5 September 2019, the parties informed that they were in the midst of negotiation for an amicable settlement. The court then fixed 1 October 2019 for hearing of the OS pending settlement. The court directed to parties to exhaust all their affidavits before the next hearing and also directed the parties to ensure the deponents of the affidavits be present for cross-examination on 1 October 2019 in the event the parties could not settle the matter amicably by then. On 1 October 2019, this court was informed by the parties that they could not resolve the matter amicably. The first defendant and third defendant had filed further affidavits ie encls 27, 28 and 29. These three affidavits ('the impugned affidavits') were filed a day before the hearing ie on 30 September 2019. The plaintiff objected to the admissibility and consideration of the impugned affidavits.

F

G

H

I

Held:

(1) The impugned affidavits ought to have been filed earlier as the parties were directed to exhaust all the affidavits before the hearing of the OS proper. The defendants were given ample time to exhaust their affidavits, but the defendants ignored the court's direction (see para 15).

(2) The ruling was made in the course of hearing of the OS, although the hearing was later adjourned because the parties had reached a temporary settlement by entering into a further interim consent order pending disposal of the OS proper in due course. Thus far, none of the parties' rights had been disposed or affected by the ruling of the court. Therefore, the ruling of the court had been excluded from the definition of a 'decision' within s 3 of the Courts of Judicature Act 1964. In turn, the 'ruling' of the court was not appealable, and it fell outside of s 67 of the Court of Judicature Act 1964. The defendants could always raise their dissatisfaction of the court's ruling in their grounds of appeal at the later stage in the event the final decision of the disposal of the OS was not in their favour (see paras 20 & 22).

[Bahasa Malaysia summary

Saman pemula ('OS') yang difailkan oleh plaintif pada 25 Februari 2019 adalah, antara lain, untuk perintah bahawa hak, penjagaan dan kawalan anak perempuan plaintif, berumur 1 1/2 tahun, diberikan kepada plaintif. Pada 1 Julai 2019, pada hari perbicaraan itu sendiri, defendan pertama memfailkan afidavit jawapan kepada afidavit kedua plaintif yang difailkan pada 10 Jun 2019. Memandangkan pemfailan saat akhir afidavit jawapan defendan pertama, mahkamah tidak dapat meneruskan perbicaraan OS kerana plaintif memohon kebenaran untuk membalas afidavit jawapan defendan pertama. Walaupun penangguhan perbicaraan OS yang disebabkan oleh pemfailan saat akhir afidavit jawapan defendan pertama, pihak-pihak mencapai kata sepakat untuk memasukkan perintah persetujuan sementara dalam syarat-syarat seperti yang dipersetujui. Salah satu syarat yang disepakati dalam perintah persetujuan sementara adalah bahawa keseluruhan syarat dalam perintah sementara tersebut akan disemak oleh mahkamah pada 5 September 2019. Pada 5 September 2019, pihak-pihak memaklumkan bahawa mereka sedang dalam proses rundingan untuk penyelesaian yang baik. Mahkamah kemudian menetapkan 1 Oktober 2019 untuk mendengar OS sementara menunggu penyelesaian. Mahkamah mengarahkan kepada pihak-pihak untuk menyatakan semua afidavit mereka sebelum perbicaraan berikutnya dan juga mengarahkan pihak-pihak untuk memastikan deponen afidavit hadir untuk pemeriksaan balas pada 1 Oktober 2019 sekiranya pihak-pihak tidak dapat menyelesaikan masalah tersebut secara baik pada ketika itu. Pada 1 Oktober 2019, mahkamah ini diberitahu oleh pihak-pihak bahawa mereka tidak dapat menyelesaikan masalah tersebut secara baik. Defendan pertama dan defendan ketiga telah memfailkan afidavit lanjutan iaitu lampiran 27, 28 dan 29.

Ketiga-tiga afidavit ini ('afidavit yang dipersoalkan') telah difailkan sehari sebelum perbicaraan iaitu pada 30 September 2019. Plaintif membantah kebolehterimaan dan pertimbangan afidavit yang dipersoalkan.

Diputuskan,

(1) Afidavit yang dipersoalkan seharusnya difailkan lebih awal kerana pihak diarahkan untuk menyatakan semua afidavit sebelum pendengaran OS. Defendan diberi banyak masa untuk menyatakan afidavit mereka, tetapi defendan tidak mengendahkan arahan mahkamah (lihat perenggan 15).

(2) Keputusan itu dibuat dalam proses perbicaraan OS, meskipun perbicaraan kemudian ditangguhkan kerana pihak-pihak telah mencapai penyelesaian sementara dengan memasuki perintah persetujuan sementara sementara menunggu pelupusan OS pada waktunya. Setakat ini, tiada hak pihak yang dilupuskan atau dipengaruhi oleh keputusan mahkamah. Oleh itu, keputusan mahkamah telah dikecualikan daripada definisi 'keputusan' dalam s 3 Akta Mahkamah Kehakiman 1964. Dengan itu, 'keputusan' mahkamah tidak boleh dirayu, dan jatuh di luar s 67 Akta Mahkamah Kehakiman 1964. Defendan boleh membangkitkan ketidakpuasan mereka terhadap keputusan mahkamah dalam alasan rayuan mereka pada peringkat kemudian sekiranya keputusan akhir pelupusan OS tidak memihak kepada mereka (lihat perenggan 20 & 22).]

Cases referred to

Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor [2015] 1 MLJ 847, CA (refd)

Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 67

Yeo Yang Poh (CL Lee with him) (Yeo Chambers) for the plaintiff.
TY Lee (Hong & Fong) for the defendant.

Choo Kah Sing J:

INTRODUCTION

[1] This decision serves as the reasons as to why this court ruled three of the defendants' affidavits (encls 27, 28 and 29) inadmissible during the course of the hearing.

A BRIEF BACKGROUND FACTS

[2] The originating summons ('OS') was filed by the plaintiff on 25 February 2019. In gist, the plaintiff sought, inter alia, for an order that the rights of custody, care and control of the plaintiff's daughter, one and half years of age, be granted to the plaintiff.

[3] On 9 May 2019, the defendants filed an application to transfer the OS action to the High Court of Muar. The said application was dismissed by this court on 26 June 2019. On the same day, this court fixed 1 July 2019 to hear the substantive argument for the OS.

[4] On 1 July 2019, the hearing day itself, first defendant filed an affidavit in reply (encl 16) in response to the plaintiff's second affidavit (encl 13) which was filed on 10 June 2019. In view of the last minute filing of the first defendant's affidavit in reply, the court could not proceed with the hearing of the OS because the plaintiff sought permission to reply to the first defendant's affidavit in reply.

[5] Notwithstanding the adjournment of the hearing of the OS caused by the last minute filing of the first defendant's affidavit in reply, the parties reached a consensus to enter an interim consent order in the terms as agreed. One of the terms agreed in the interim consent order was that the entire terms in the said interim order will be subjected to a review by the court on 5 September 2019.

[6] On 5 September 2019, the parties' counsels came before the court and informed that the parties were in the midst of negotiation for an amicable settlement. The court then fixed 1 October 2019 for hearing of the OS pending settlement. The court directed to parties to exhaust all their affidavits before the next hearing and also directed the parties to ensure the deponents of the affidavits be present for cross-examination on 1 October 2019 in the event the parties could not settle the matter amicably by then. The parties' counsels agreed to abide by the directions.

[7] Between 5 September 2019 and 1 October 2019, the second and third defendants had each filed an affidavit (encls 22 and 23 respectively). The plaintiff had filed two more affidavits (encls 25 and 26).

[8] The plaintiff had filed in total five affidavits (encls 2, 13, 21, 25 and 26); whereas, the first defendant had filed two affidavits (encls 9 and 16), and second and third defendants had filed one affidavit each (encls 22 and 23 respectively).

[9] On 1 October 2019, this court was informed by the parties' counsels that the parties could not resolve the matter amicably. The defendants' counsel (for the first defendant) informed that the first defendant and third defendant had filed further affidavits (encls 27 and 28 affirmed by the first defendant; encl 29 affirmed by the third defendant). These three affidavits (encls 27, 28 and 29 — hereafter the 'impugned affidavits') were filed a day before the hearing on 1 October 2019, ie on 30 September 2019.

[10] The plaintiff's counsel objected to the admissibility and consideration of the impugned affidavits.

DECISIONS OF THIS COURT

[11] The plaintiff's counsel raised the following objections to the admission of the impugned affidavits. First, with regard to the first defendant's affidavits (encls 27 and 28), the first defendant had exhibited many exhibits in the two affidavits which could have been exhibited earlier in her two previous affidavits filed on 14 May 2019 (encl 9) and 1 July 2019 (encl 16). But, the first defendant chose to produce those exhibits at the eleventh hour. Clearly, the first defendant was trying to delay the hearing of the OS proper.

[12] Secondly, there were allegations of facts in those impugned affidavits including third parties who were not party to the action.

[13] Thirdly, the defendants had on two occasions filed their affidavits last minute to delay the hearing of the OS. The first occasion was on 1 July 2019 where the first defendant filed and served her second affidavit (encl 16) on the hearing day. The second occasion was on 5 September 2019 where the second and third defendants filed and served their respective affidavits (encls 22 and 23) last minute. This time was the third occasion that the defendants tried to file their affidavits last minute, a day before the hearing fixed on 1 October 2019. Clearly, it shows that the defendants were employing a delaying tactic to adjourn the hearing of the OS proper.

[14] Lastly, the facts deposed in the impugned affidavits were neither new nor were they just discovered. Some of the facts deposed were events which happened way back in 2016, and there were repetition of alleged facts. Further, those exhibits in the impugned affidavits ought to have been exhibited earlier, as submitted earlier.

[15] This court is satisfied with the objections raised by the plaintiff's counsel in that the impugned affidavits ought to have been filed earlier as the parties were directed to exhaust all the affidavits before the hearing of the OS proper which was fixed on 1 October 2019. The defendants were given ample

time to exhaust their affidavits, but the defendants ignored the court's direction. The hearing of the OS has been adjourned several times due to adjournment caused by last minute filing of defendants' affidavits. The defendants ought to take heed of the court's direction and not file their affidavits at the last minute according to their own whim and fancy.

[16] On 1 October 2019, this court ruled that the impugned affidavit were inadmissible for hearing of the OS. Before the hearing could process further, the parties then reached a consensus to extend the consent interim order with minor amendments. The hearing of the OS was then adjourned to 10 February 2020.

[17] Despite what transpired on 1 October 2019, the defendants filed an appeal to the Court of Appeal against the ruling made by the court relating to the impugned affidavits.

[18] The decision made by this court on 1 October 2019 was merely a ruling made in the course of a hearing of the OS which did not finally dispose the rights of the parties.

[19] Section 67 of the Courts of Judicature Act 1964 confers the Court of Appeal the jurisdiction to hear and determine civil appeals from any judgment or order made by the High Court. 'Judgment' or 'order' is referred to as a 'decision', but excluded a 'ruling' made in the course of a hearing of any matter which does not finally dispose of the rights of the parties (see s 3 of the Courts of Judicature Act 1964). Hence, the ruling of this court does not fall within the ambit of an appealable decision of a High Court.

[20] In *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495, the Court of Appeal held that when scrutinizing s 3 of the Courts of Judicature Act, particularly whether a 'ruling' is appealable or otherwise, equal emphasis must be given to two qualifications. First, a ruling must be made in the course of a trial or hearing, and secondly, the ruling does not finally dispose of the rights of the parties. 'If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision' as provided in s 3 of the Act , as amended, and is therefore appealable', the Court of Appeal stated.

In the present case, the ruling was made in the course of hearing of the OS, although the hearing was later adjourned because the parties have reached a temporary settlement by entering into a further interim consent order pending disposal of the OS proper in due course. Thus far, none of the parties' rights have been disposed or affected by the ruling of this court. The two qualifications have been met, therefore, the ruling of this court has been

excluded from the definition of a 'decision' within s 3 of the Courts of Judicature Act 1964. In turn, the 'ruling' of this court is not appealable, and it falls outside of s 67 of the Courts of Judicature Act 1964.

[21] In *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847, the Court of Appeal, while reiterating the legal propositions in *Syarikat Tingan Lumber Sdn Bhd* has this to add as follows:

> [14] We would only add the following in respect of the above passage: if appeals are permitted against rulings made in the midst of a trial, this will affect a fair and expeditious disposal of court proceedings due to the likelihood for untimely and academic appeals as well as possible stays of proceedings pending such appeals (see *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217). By staying the proceedings pending the disposal of the appeal, the final decision of the court on the action will also be held up. The application within which such a ruling is made would continue to remain alive despite the ruling, and the outcome of the final decision on the action would not depend on merely such ruling. Indeed, an incorrect ruling may not even have a material effect upon the outcome of the action in question. In this regard, it is important to note that a litigant aggrieved with such a ruling may even end up succeeding in the action. In any event, in the context of the present case, if the plaintiff is dissatisfied with the final outcome of his action against the fourth defendant, he may still raise the ruling of the learned High Court judge as part of his grounds of appeal.

[22] Based on the above excerpt, the defendants could always raise their dissatisfaction of this court's ruling in their grounds of appeal at the later stage in the event the final decision of the disposal of the OS is not in their favour.

CONCLUSION

[23] For the reasons stated above in paras [11]–[15] above, this court ruled that the impugned affidavits are inadmissible for hearing of the OS.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali